UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	
v.)	
)	CRIMINAL NO. 05-10218-RCL
JESSE WILSON,)	
)	
Defendant.)	

GOVERNMENT'S REVISED SENTENCING MEMORANDUM¹

The government's submits this Revised Sentencing Memorandum in support of its Motion for Upward Departure and Deviation, and to address several objections raised by defendant Jesse Wilson to the Presentence Report ("PSR").

I. <u>Computing Wilson's Advisory Guidelines Sentencing Range</u>

Wilson pleaded guilty on January 24, 2007 to a one-count Superseding Indictment charging him with being a Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. §922(g)(1).

The government agrees with Probation's determination that Wilson's base offense level is 20 under U.S.S.G. §2K2.1(a)(4)(A), that his Criminal History Category is IV, and that his Total Offense Level after acceptance of responsibility is 17. Thus, Wilson's advisory sentencing guideline range is 37-46 months. For the reasons discussed below, and those to be addressed at the sentencing hearing, the government recommends that the Court depart and deviate upward and sentence Wilson to the maximum statutory prison term of 10 years.

¹ This Revised Sentencing Memorandum replaces the Government's Sentencing Memorandum filed on August 29, and is necessitated by significant changes in Wilson's criminal history and advisory guidelines offense level as contained in the third revised PSR.

A. Criminal History Calculation

Wilson's advisory guidelines sentencing range is dependent entirely on his prior criminal history, therefore that will be addressed here first. The third revised PSR determined that Wilson has 9 criminal history points. PSR ¶45.2 The details of the convictions included in that calculation are described in paragraphs 34-37 of the PSR. Wilson objects to the inclusion of the conviction in paragraph 35. Wilson does not object to counting the convictions in paragraphs 34, 36 and 37, each of which adds two points.

Wilson contends that the charges described in paragraph 35 did not result in a conviction to be counted as part of his criminal history because the disposition was "guilty, filed." In support, Wilson relies on a variety of Massachusetts state decisions holding that "guilty, filed" dispositions are not judgments of conviction. The most recent case cited, Commonwealth v. Simmons, 448 Mass. 687, 863 N.E. 2d 549 (2007), includes a lengthy discussion of the practice in Massachusetts of placing cases "on file." To summarize, after a guilty plea, a Massachusetts state court may, with the consent of the defendant and Commonwealth, place the case "on file," thus suspending sentencing indefinitely, but not dismissing the case. 448 Mass. at 688, 863 N.E. 2d at 551. The state court retains the power, upon motion of either party at any time, to remove the case from the file and proceed to sentencing. 448 Mass. at 696, 863 N.E. 2d at 556-57.

However, contrary to Wilson's position, a "guilty, filed" fits squarely within the sentencing

² In the first revised PSR, the Probation Office determined that Wilson had 18 criminal history points. Thereafter, Wilson filed a motion in the Fall River District Court for a new trial on five of his prior convictions, which the court allowed on July 17, 2007. As a result, Wilson's criminal history points were reduced to 10, and he was no longer deemed an Armed Career Criminal subject to a 15 year minimum mandatory sentence. The third revised PSR concluded that because the conviction described in ¶33 was committed while Wilson was under 18, it was not to be included in calculating his criminal history, thus reducing it further to 9 points.

guidelines definition of a "prior sentence." U.S.S.G. §4A1.2(f) ("A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered . . ."). The relevant criminal docket (attached as Exhibit A) reflects that Wilson pleaded guilty to Resisting Arrest, Disorderly Conduct and Disturbing the Peace, and that all three charges were "filed" with Wilson's consent. Thus, even though a conviction was never formally entered, Wilson's admission of guilt is counted under §4A1.1(c). The inclusion of such diversionary dispositions in calculating a defendant's criminal history "reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." U.S.S.G. §4A1.2, Comment (n. 9).

In the alternative, the "guilty, filed" in paragraph 35 is countable as a "prior sentence" because it is a conviction for which Wilson has not yet been sentenced. §4A1.2(a)(4) ("Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable"). For purposes of that paragraph, a conviction is defined to mean "that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere." Id. Wilson's guilt in the state case was established by his guilty plea and, under Massachusetts procedure, his sentencing was postponed indefinitely (i.e., filed). Commonwealth v. Simmons, supra. Thus, it was a conviction for which he had not yet been sentenced.

For all these reasons, the offenses described in ¶35 of the PSR, and reflected on Exhibit A,

were properly included, and one point added, in the criminal history calculation.³

B. Base Offense Level

It is not clear whether Wilson is now conceding the correctness of the PSR's base offense level calculation of 20 (third addendum to PSR, objection #1), or is still contending that it is only 14 (second addendum to PSR, objection #1). The government agrees with the Probation Office's calculation of 20.

Under §2K2.1(a)(4)(A), the base offense level is 20 if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense. Wilson's conviction for Resisting Arrest (¶35) qualifies as a crime of violence.⁴ As discussed in the preceding section, that conviction properly received a criminal history point under §4A1.1(c). Therefore, by definition, it is included as a prior felony conviction for purposes of §2K2.1(a)(4)(A). See U.S.S.G. §2K2.1, Comment (n. 10) ("For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c)).

³ Wilson also contends in Objection #7 (Second Addendum) that since five of his prior convictions have been vacated, he should not receive two criminal history points for committing the current offense less than two years after release from a prior sentence. But as the PSR noted in response, the offense described in ¶36 was not vacated and that serves as a basis for this enhancement. See also PSR ¶44.

⁴ A "crime of violence" is defined as any federal or state offense punishable by a term of imprisonment exceeding one year, that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. §4B1.2(a). Under Massachusetts law, Resisting Arrest carries a maximum term of imprisonment of two and a half years, and involves knowingly preventing or attempting to prevent a police officer from effecting an arrest by "(1) using or threatening to use physical force or violence against the police officer or another; or (2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another." M.G.L. c. 268 §32B. Thus, the statutory elements fit within the guidelines definition of "crime of violence."

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Based on all the foregoing, the government submits that Wilson's Total Offense Level, after acceptance of responsibility, is 17, his Criminal History Category is IV, and his Guidelines Sentencing Range is 37-46 months.

III. Government's Motion for Upward Departure and Deviation

The government has moved for an upward departure and deviation to a sentence of 10 years imprisonment, based on the inadequacy of Wilson's criminal history category (U.S.S.G. §4A1.3), as well as the factors set forth in 18 U.S.C. §3553(a).

A. <u>Inadequacy of Wilson's Criminal History Category</u>

As noted above, Wilson's criminal history at the time of his guilty plea included five convictions which have since been vacated. All of those charges remain outstanding. The vacated convictions include Assault and Battery on a Police Officer (PSR ¶49), Possession of a Class D Substance (PSR ¶49a), Assault and Battery (PSR ¶49b), Assault and Battery (PSR ¶49c), and Assault and Battery (PSR ¶49d). After pleading guilty, Wilson was sentenced to prison time for three of those convictions (PSR ¶49, 49a, 49c). The other two were "filed" after guilty pleas. In addition, a conviction for Possession of a Class B Substance With Intent to Distribute is not included in the criminal history calculation because it was committed before Wilson turned 18 and the sentence imposed more than five years before the present offense.⁵

Wilson contends that, contrary to the PSR, the record does not reflect that he pleaded guilty to Possession of a Class B Substance with the Intent to Distribute, but only to Possession. In support, Wilson relies on the Tender of Plea form in that state case. (A copy of that form, appended to the docket, is attached as Exhibit B). But as the PSR notes, that was merely Wilson's proposal, which was rejected by the judge, who instead adopted the government's recommendation. See response to objection #4, first addendum; Exhibit B (Section II). Most importantly, the official record contained in the criminal docket sheet (Exhibit B) reflects that Wilson admitted to sufficient facts for Possession of a Class B Substance with Intent to Distribute and the matter was continued without a finding.

The guidelines state that an upward departure may be warranted if "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." §4A1.3. Here, Wilson's total criminal history points, prior to the five convictions being vacated, was 18, and his Criminal History Category was VI. See PSR revision dated 6/20/07 at ¶45, 46. Wilson had also been subject to the Armed Career Criminal Provisions of 18 U.S.C. §924(e), with a resulting increase in his Total Offense Level to 30, id. at ¶30, a mandatory minimum of 15 years and a guideline range of 180-210 months. Id. at ¶96, 97. Since those five convictions have been vacated, they may not be counted in calculating Wilson's criminal history. But the Court may consider the underlying criminal conduct in determining whether an upward departure under §4A1.3 is warranted. §4A1.2, Comment (n. 6).6

As for the under-18 conviction, the Court may consider it in determining whether to depart upward under §4A1.3 if the Court finds that the conviction is evidence of similar, or serious dissimilar, criminal conduct by the defendant. §4A1.2, Comment (n. 8). Two of Wilson's countable convictions and one of the vacated ones involved similar criminal conduct, i.e., possession of illegal drugs. PSR ¶¶34, 35 and 49a. This under-18 conviction was similar and more serious - possession with intent to distribute - thus it provides further support for an upward departure.

⁶ In the alternative, in determining whether such an upward departure is appropriate the sentencing court may consider "[w]hether the defendant was pending trial or sentencing on another charge at the time of the instant offense." §4A1.3(a)(2)(D). At the time Wilson committed the present offense, two of his prior Assault and Battery offenses (PSR ¶49b, 49c), had been resolved by pleas of "guilty, filed." Thus, he was awaiting sentencing on both. Moreover, since all five convictions have been vacated and the charges remain outstanding, they could all be deemed to have been "pending trial" at the time Wilson committed the current offense.

Wilson's five vacated convictions all involved either crimes of violence or controlled substance offenses, and he was sentenced to prison time for three of them.⁷ Wilson's under-18 offense was a controlled substance offense, which Wilson committed when he was only 17 days short of turning 18. These six, serious, uncounted convictions establish that Wilson's criminal history category substantially under-represents the seriousness of his true criminal history and the likelihood that he will commit other crimes.

For all the above reasons, the Court should depart upward to a Criminal History Category VI (§4A1.3(a)(4)(A)), and further depart upward from Category VI to at least a level 22 (§4A1.3(a)(4)(B)). See, e.g., United States v. Tavares, 93 F.3d 10, 16-17 (1st Cir. 1996).

B. 18 U.S.C. §3553(a) Factors

A consideration of the factors set forth in 18 U.S.C. §3553(a) further supports and counsels for a sentence above the applicable advisory guideline range, and above a departure based on the inadequacy of Wilson's criminal history category. The primary justifications for a further increase in Wilson's sentence are the need to reflect the seriousness of the offense; the need to afford adequate deterrence to criminal conduct; and, the need to protect the public from further crimes by Wilson.

Wilson's offense of being a felon in possession of a firearm and ammunition is a serious one,

⁷ Wilson appears to have taken steps to prevent a final adjudication on those charges, which are still pending, until after he is sentenced in this case. After Wilson's motion for new trial was allowed, the state court scheduled those trials for September 28, 2007, which would have been after the then-scheduled September 5 sentencing date in this case. See copy of docket sheets from the Fall River District Court, attached as Exhibit C. After this Court, sua sponte, continued the sentencing to November 5, Wilson filed a motion to continue the state trials. Id. Although that motion stated the unavailability of counsel as reason for the continuance, all of the new dates requested by Wilson were after November 5. See copy of motion, attached as Exhibit D. The state court has scheduled trial of those cases for November 14.

as were the circumstances of his carrying the gun and his arrest. The firearm and ammunition were not found locked up in Wilson's home. Instead, he was carrying the loaded gun with him in the backseat of a car on a late summer afternoon in an area of Brockton known for its street level drug dealings, violent crime and prostitution. The likelihood that the gun was to have been used in some other criminal activity is great. Moreover, when police officers ordered Wilson from the car, he attempted to escape, punching and kicking the officers and reaching for one officer's gun in an unsuccessful attempt to break free. PSR ¶12.

Wilson's history and personal characteristics also support an enhanced sentence. Wilson, who is only 27, was expelled from high school in the 10th grade subsequent to an arrest. PSR ¶81. Wilson was in state custody "intermittently" from 1998 to 2003, and from 2/18/04 to 10/14/04. PSR ¶87, 89. Since 1998, Wilson has had only one confirmed, legitimate job, working for six months at a Dunkin'Donuts. PSR ¶84-89. He started that job shortly after being released from state custody, quit that job after six months, and within another month had been arrested on the current offense. PSR ¶86.

A sentence well above the applicable advisory guideline range is necessary to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for this offense. Wilson's history and record of assaults and drug offenses reflect a person who is disrespectful of the law and other people. However, the state sentences he has received for those crimes have all been fairly modest and it is obvious that they have not deterred Wilson from further criminal activity. A substantial sentence now is necessary to send a clear message of deterrence to Wilson. Moreover, a lengthy term of incarceration is necessary to protect the public from Wilson. The sooner Wilson is released, the sooner he will be back on the streets. Everything about his

history to date shows that he is a danger to society.

IV. Conclusion

For all the above reasons, the government recommends a sentence of 120 months imprisonment, to be followed by 3 years of supervised release, a fine of \$5,000 and a mandatory special assessment of \$100.

V. Proposed Findings of Fact and Conclusions of Law

The government proposes that the Court make the following findings of fact and conclusions of law in imposing a sentence above the applicable advisory guidelines range:

1. I find by reliable information that: a) the criminal conduct underlying Wilson's five convictions for serious crimes of violence and controlled substance offenses which have been vacated recently and remained pending against Wilson at the time of the present offense (PSR ¶49-49d) are relevant to determining an upward departure under §4A1.3; b) Wilson's conviction for Possession of a Class B Substance with Intent to Distribute was committed 17 days prior to Wilson turning 18 and was similar to, and more serious than, other drug crimes he committed; and c) had those six convictions been considered in calculating Wilson's guideline range and Criminal History Category, Wilson would have had a CHC of VI and be facing a 15 year mandatory minimum prison sentence and an advisory guideline range of 180-210 months. These factors establish to me that Wilson's criminal history category substantially under-represents the seriousness of his criminal history or the likelihood that he will commit other crimes, §4A1.3, meriting an upward departure to a Criminal History Category VI. I also find that the extent and nature of Wilson's criminal history category, as described in the PSR, are sufficient to warrant an upward departure from CHC VI, and an increase of his offense level to 22, for a sentencing guideline range of 84-105 months.

2. Based on Wilson's serious and dangerous offense conduct in the present case, his violent actions during arrest, his substantial criminal history, his repeated state incarcerations since 1998, his lack of legitimate employment while not in custody, and his propensity to engage in violent and drug related actions, I find that the need to reflect the seriousness of the offense; the need to afford adequate deterrence to criminal conduct; and the need to protect the public from further crimes of the defendant (18 U.S.C. §3553(a)) together merit a further deviation upward from the advisory sentencing guidelines to a sentence of 120 months imprisonment, the maximum sentence for this offense.

Respectfully submitted,

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Date: October 30, 2007

Certificate of Service

I hereby certify that on October 30, 2007, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Mark J. Balthazard MARK J. BALTHAZARD Assistant U.S. Attorney

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Case 1:05-cr-10218-RCL Document 33-3 Filed 10/30/2007 Page 3 of 4 Defendant in this case hereby tenders the following: PLEA OF GUILTY ADMISSION TO FACTS SUFFICIENT FOR A FINDING OF GUILTY conditioned on the dispositional terms indicated below. Include all proposed terms (guilty finding, finding of sufficient facts, continued without finding dismissal, fine, costs, probation period and supervision terms, restitution amount including the identification of the recipient of restitution, and any sentence of incarceration, split sentence or suspended sentence, etc.). Number each count and specify terms for each count separately. **DEFENDANT'S DISPOSITIONAL TERMS** PROSECUTOR'S RECOMMENDATION COUNT (Check "Yes" if Prosecution agrees - Check "No" If Prosecution disagrees) (Required if Prosecutor disagrees with terms) NO. CWOF IYEAR YES NO D.3 ~~ YES POSSONLY CHOF IYEAR NO YES d RUG TREGO MEX/7 NO YES Jail Brake" Program NO Narhun St. YES answort. WE HAVE CONSULTED WITH THE PROBATION DEPARTMENT REGARDING ANY PROBATION TERMS SET FORTH ABOVE. SIGNATURE OF PROSECUTING OFFICER SIGNATURE OF DEFENSE COUNSEL DATE Х SECTION II PLEA OR ADMISSION ACCEPTED BY THE COURT ACCEPTS the tendered Plea or Admission on defendant's terms set forth in Section I, and will impose sentence in accordance The Court with said terms, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS. SECTION III PLEA OR ADMISSION REJECTED BY THE COURT DEFENDANT'S DECISION IF COURT REJECTS TENDERED The Court REJECTS the defendant's dispositional terms set forth PLEA OR ADMISSION: above and, in accordance with Mass. R. Crim. P. 12(c)(6), has set forth to the defendant the dispositional terms it would find acceptable, to wit: Defendant WITHDRAWS the tendered Plea or Admission: the parties must complete and file a Pretrial Conference gov't = rec. is accepted Report, a Pretrial Hearing must be conducted and a trial date scheduled, if necessary. Defendant ACCEPTS terms set forth by the doubt, a Plea or Admission will be accepted by the court and said dispositional terms imposed subject to submission of defendant's writter WAIVER (see Section IV on reverse of

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR

ADMISSION X

this form), completed of the required oral COLLOGITY, a determination that there is a FACTUAL BASIS for the Plea

or Admission, and notice of ALIEN RIGHTS

SIGNATURE OF DEFENSE COUNSEL (Control decision made)

Probation Office

West Roxbury District Court 445 Arborway Jamaica Plain, MA 02130 COMMONWEALTH VS Jens Wilson 3i Colman Park #1 Applying; MA 02/19

48	aints (D	ocket Number(s) and Brief Descr Y True CWOP 5/1/2000 i	iption):	, 1977 for a hearing on a charge that you 5/1, 1978 on the following
		CWOP 5/1/2000 1	'WF	
(Strik	out (1)	or (2) below, whichever is inapp	licable):	
both l	Court so learings	finds, there will be a subsequent may be held at the same time. T	hearing on the issue of revocation a	re you have committed a violation of your probation and imposition of additional sanctions. If you wish hearings unless you expressly agree thereto. In the hearing if you wish.
(2)	This	hearing will be a final hearing on	the issue of whether your probation	shall be revoked and additional sanctions imposed
You h	ave the_	following rights:		
(1) (2) (3) (4) (5)	A rig as we A rig A rig A rig	ht to be confronted by the person all as any other persons who testife to insist that all testimony be unto remain silent and not to be put to testify on your own behalf, to	y against you. nder oath. orejudiced thereby.	s of your probation and to cross-examine that perso ence to support your denial of the alleged violations
The n	otice of	the alleged violation(s) of probati	on is as follows:	
	Alley	ed Violations	<u>Date</u>	<u>Place</u>
			**See checked boxes for violations*	
	Ħ	Subsequent Offense Rolling	my Court CSA POSS B	4/13/99
	C	Failure to report to Probation	as scheduled. Dates:	
	ρÌΥ	Failure to pay Court ordered	fees. Amount due: 11215.00	
		Failure to successfully compl	ete ordered program.	
	0	runare to successfully compr	. 0	
	o c	Other:	. 5	
	C	Other: appear in Court at the time and pl	. 5	request a continuance if additional time is required

BRING THIS NOTICE WHEN YOU REPORT

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02/18/2004		ETURN DATE 02/18/20	04 00:20-00				of trial rights as p			
DUNT/OFFENSE			04 06:30.00 ARREST	FINE	TSURFINE	Advised COSTS	of right of appeal	O Appeals Ct (R. 28)		
1. 265/13A/B A&B o	265 §13A(a)			100.0%	J ************************************	Restriction	WAVE		
DISPOSITION DATE and JUDGE	DI P. 11.	∽ .	SENTENCE OR OTHER DISPOSITI		· ·			·		
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lo Sufficient Facts accepted after colloquy	Guilty M	À	Dismissed upon: Requi	est of Comm.	Request of Victi			edit Timethe		
and 278 §290 warning	Not Respon		Request of Deft	Fallure to pros		• •	-	east Timethe		
☐ Bench Trial ☐ Jury Trial	Responsible		FINAL DISPOSITION	Note Prosequ	ii Decr	lminelized (27	7 §70C)			
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	Motion	in Limiue	Regardin	g Comm's	use of D	efend	ant's Rec	ord of Pric	or Con	victio
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CHAMPAGNE, JOHN	<u> </u>	FA	LL RIVER PD - DISP	رنسي	1///	74-	_ - ₩	alver of jury trial fo	und after collor	quy		
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1. 265/13A/B A&B c	265 §13A	(a)		<u> </u>						VAIVED		
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and 278 §29D warning	Guilty Not Rec	poneio (Request of Deft	Teallure to pros		of Victim		•				
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Jury Trial	=	sble Cause	FINAL DISPOSITION Dismissed on recommendation	of Probation Dept.			JUDGE	DATE	DATE			
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and 276 §29D warning	Not Res	sponsible sible	Filed with Deft's consent	Failura to prosecute Other: Note Prosequi Decriminalized (277 §700)								
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THE HALL WAY					_00	70		PR ∐. (1861): Held (276 §58A)	
		Atr.				1 -2 201		see back for speci	al conditions
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04/20/1980 M TE OF OFFENSE(S)		PLACE OF	OFFENSE(S)		ł	•	1 LJ:	weiver lied of Ingif Maxa gunb at trigif	(278 §58)
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TE OF COMPLAINT		RETURN DA	ATE AND TIME	<u> </u>	<u> </u>	11000			found after collequy
10/02/2003 JUNT/OFFENSE		10/02/	2003 08:30:00				Advised	d of trial rights as o	to Appeals Ct (R. 28)
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accepted after colloquy and 278 §29D warning	Guilty	MM	Dismissed upon: TRequest of Defi	_		Request of Vic	util	27043	26K120Z
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4. 268/32B RESIST DISPOSITION DATE and JUDGE	ARREST	CZ66 93	SENTENCE OR OTHER DISP	OSITION		<u> </u>			
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COMMONWEALTH OF MASSACHUSETTS

FALL RIVER DISTRICT COURT

DOCKET NO. 0432CR001282. 0332CR007143, 0332CR008689, 0332CR008409 and 0332CR007325

COMMONWEALTH OF MASSACHUSETTS

V.

JESSE WILSON

MOTION TO CONTINUE

NOW COMES the defendant, by and through counsel, and hereby moves this Court to continue his September 28, 2007 hearing to November 9, November 14 or November 16, 2007.

In support of this Motion, the defendant states as follows:

- 1. The defendant is scheduled to appear in this Court on September 28, 2007 for a hearing.
- 2. However, the undersigned counsel has a hearing in Concord, New Hampshire in the case of State v. Hovey on said date,
 - 3. That the defendant is aware of the within motion and is presently incarcerated.
 - 4. That the District Attorney's Office assents to the within Motion.

WHEREFORE, the defendant respectfully requests that this Court grant the within Motion.

Respectfully submitted, Jesse Wilson, By his Attorney,

Paul J. Garrity

14 Londonderry Road

434-4106

Londonderry, NH 03053